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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 993

VIRGIL D. BELL, ET AL.,

Petitioners,

vs.

SETON PORTER, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The petitioners, Virgil D. Bell and 52 others who were plaintiffs in this cause, pray that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Seventh Circuit in the above entitled cause.

Opinons Below

The opinion of the Circuit Court of Appeals for the Seventh Circuit (R. 414) is reported in 6 Wage Hour Cases 498. The District Court's memorandum opinion (R. 322) is reported at 66 F. Supp. 49.

Jurisdiction

The judgment of the Circuit Court of Appeals for the Seventh Circuit was entered on December 10, 1946 (R. 420). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

Question Presented

Whether the night hours which petitioners, though permitted to sleep, were required to spend on the employer's premises as part of the employer's fire protection system, were part of their workweek within the meaning of the Fair Labor Standards Act.

Statute Involved

The relevant provisions of the Fair Labor Standards Act of 1938 are set forth in the Appendix.

Statement

The petitioners brought this suit under the Fair Labor Standards Act to recover unpaid overtime compensation, liquidated damages and attorney's fees, for the period from February 27, 1944 to December 1, 1945.

The relevant findings of fact of the District Court (R. 372) may be summarized, briefly, as follows:

The petitioners, 53 in number, were all employed as fire fighters by respondents, a co-partnership styled Sanderson and Porter, during the period from February 27, 1944 to December 1, 1945. Respondents operated the Elwood Ordnance Plant under a cost-plus-fixed-fee contract with the United States Government (R. 372).

The plant was engaged in manufacture and processing of war materials, such as shells, bombs, explosives and munitions, in interstate commerce. The plant site was 23 square

miles in area, divided into three parts—high explosives, loading lines, fuse and booster areas. There were 1100 structures on the premises (R. 372).

The plant maintained its own fire protection department, with three stations at strategic points and fire fighting equipment. From 1941 to February 27, 1944, the firemen worked in three eight-hour shifts, six days a week. In the late summer of 1943, respondents contemplated a two-platoon system, twenty-four hours on, twenty-four hours off—as suggested by the Army. The firemen rejected the plan on two occasions, first on a written vote and then on a voice vote. They had various objections to the plan, and felt that an arrangement of clocking out for 8 hours out of each 24-hour shift would be satisfactory only if accompanied by a very substantial salary increase to compensate them for time at the station without being paid (R. 373-374).

In December 1943, respondents requested another vote. This time, the firemen voted unanimously in favor of the two-platoon plan (R. 374-375). The ballot, Defendant's Exhibit 1, was as follows (R. 290):

"2 Platoon System

Vote by placing your 'X' mark opposite 1, 2 or 3. If 'X' mark is placed opposite 2 or 3, *please give reason.*

1. For 2 platoon system .....
2. Against 2 platoon system .....
   Reason:
3. Cannot work under this system and desire transfer .....
   Reason:

_____ _____

Name Clock"

After reviewing the conflicting evidence, the District Court found that the firemen, before voting, were given to understand that if they wanted to retain their jobs as firemen they would be required to vote for the plan, and if they did not vote for the plan they would be transferred or discharged. The Court further found that a number of petitioners did not understand what their wages would be under the two-platoon plan (R. 375).

The firemen at each station were divided into two platoons. A platoon reported for duty at 7:30 a. m. and remained on duty on the premises until relieved by the other platoon at 7:30 a. m. the following day. Respondents considered the hours from 7:30 a. m. to 11:30 p. m. working time, but did not compensate the firemen for the hours from 11:30 p. m. to 7:30 a. m., when they were permitted to sleep, except for those hours when they were called out to answer fire alarms (R. 376).

No increase in the base pay rate of 85¢ per hour was provided over the three-shift system. Under the two-platoon system, on respondents' computation, the average weekly pay of the firemen was $54.40, compared with $44.20 under the three-shift system, but only 68 men were necessary as compared with 106 to 108 under the three-shift system. There was accordingly a substantial saving of manpower and money to respondents (R. 376-377).

The duties of the firemen were to fight fires, take care of the premises and the equipment, drill, deliver reports and attend school. During the evening, if no duties were assigned, they were permitted to read, listen to the radio, or play cards. After 11:30 p. m. they were free to retire, and no active duties were assigned, except for night alarm duty. However, a few petitioners were assigned actual duties, to pick up laundry and drive dispatchers, between 11:30 p. m. and 7:30 a. m. During these hours as during

the remainder of the day there was a production shift in the plant engaged in the manufacture or processing of bombs, shell loading, and other munitions processes. The greatest explosion and fire at the plant took place between 11:30 p. m. and 7:30 a. m., on June 6, 1942, when 48 men were injured or killed (R. 378-379).

In view of the fire hazard, it was necessary to have a fire department on duty between 11:30 p. m. and 7:30 a. m. (R. 151). The firemen were required to remain in the fire stations or within hailing distance between 11:30 p. m. and 7:30 a. m., as at all other times during the 24-hour period (R. 376). There were instances when petitioners were docked at time and one-half for hours or minutes away from the premises between 11:30 p. m. and 7:30 a. m. On other occasions, firemen were permitted to be absent without deductions from pay, between 11:30 p. m. and 7:30 a. m. (R. 379).

Respondents furnished to the firemen in each station sanitary and sleeping facilities, including steel double bunks, 3-inch cotton mattresses. The same bunks, mattresses, blankets and pillows used by the off-going shift were used by the on-coming shift (R. 377).

The conditions in the three fire stations varied slightly. In each station the plant radio operated continuously, 24 hours a day, close to the sleeping quarters. The radio carried police car calls every few minutes, time reports every half hour, and fire alarms. The volume was twice as loud as the ordinary radio or normal speaking voice, and in one station was even louder. Complaints were made about the volume of the radio at night, and the men were told by their superiors that the volume could not be turned down. The respondents considered the radio "a second line of defense" in the event that the telephone alarm system was

not working. It was also used as a communications system after the men were alerted for a fire (R. 377-378).

The District Court made findings on other conditions in the fire stations. In one station the kitchen and sleeping quarters were part of the same room and the men, having no kitchen sink, washed dishes and utensils in the lavatory. In another station the guards walked through the sleeping quarters to use the toilet facilities. Between the time signals on the half hour, there were radio report calls for squad cars, police radio calls, conversation between guards, fire reports and other noises, which were distinctly audible and fairly understandable in the sleeping quarters. Alarm bells rang incessantly on stormy nights (R. 377-378).

The District Court found that if petitioners had been free to sleep elsewhere they would not have chosen sleeping quarters similar to those furnished by respondents (R. 378).

The District Court stated as a conclusion of law that between 11:30 p. m. and 7:30 a. m. petitioners were under the control of respondents, were required to and did hold themselves to instant readiness to serve when called, and spent the time upon the premises predominantly for the benefit of the respondents as an incident of the employment and as the only practical means for getting instant service in case of fire. The District Court entered judgment for petitioners (R. 381-382).

The Circuit Court of Appeals stated in its opinion that petitioners, in consideration of their employment as firemen, were willing to sleep on the premises and keep available for duty, that they had a contract to wait to be engaged. It reversed with instruction to dismiss the complaint (R. 414).

Specification of Errors To Be Urged

The Circuit Court of Appeals for the Seventh Circuit erred:

1. In failing to affirm the ruling of the District Court, which held that the hours of the sleeping period were spent by petitioners on the employer's premises predominantly for the benefit of the employer, and were therefore part of the workweek.

2. Alternatively, in failing to give effect to the District Court's findings as to the inadequacy of the sleeping accommodations, either by affirming, or remanding for specific findings on whether the employees secured normal rest.

3. In treating the circumstances of this case as an agreement to settle the questions whether certain activity constitutes work or employment, in view of all the facts surrounding the employees' vote, including the employer pressure found by the District Court.

4. In giving undue effect and significance to such an agreement, assuming one to exist.

5. In reversing the judgment of the District Court with instructions to dismiss the complaint.

Reasons For Granting the Writ

The petitions for certiorari in this case, and in *Bowers* v. *Remington Rand*, No. 995, and *Rokey* v. *Day and Zimmerman, Inc.*, 157 F. (2d) 734 (C. C. A. 8th), No. 994, all relate to the application of the Fair Labor Standards Act to "two platoon" systems of fire protection, under which firemen stay at the station twenty-four hours, and go off for twenty-four hours. The reasons for granting the writ as presented

in this petition are in large part the same as those presented by the other two petitions, and this discussion underlies the three applications.

1. The decision below misinterprets and is in conflict with the applicable decisions of this Court.

In *Armour & Co.* v. *Wantock*, 323 U. S. 126, and *Skidmore* v. *Swift & Co.*, 323 U. S. 134, this Court considered private fire protection systems under which fire fighters remained at a factory for 24 hours and then went off duty for 24 hours. This Court affirmed a decision applying the Fair Labor Standards Act to hours spent in playing cards and other pleasurable pursuits, observing (323 U. S. at 133): "Readiness to serve may be hired, quite as much as service itself, and time spent lying in wait for threats to the safety of the employer's property may be treated by the parties as a benefit to the employer. Whether time is spent predominantly for the employer's benefit or for the employee's is a question dependent upon all the circumstances of the case." *Armour & Co.* v. *Wantock, supra.* It held that whether waiting time was working time under the Act is "a question of fact to be resolved by appropriate findings of the trial court" *Skidmore* v. *Swift & Co.*, 323 U. S. 134, 136.

In the present case the District Court applied the decisions in the *Wantock* and *Skidmore* cases. It made findings of fact and held that the time spent by petitioners upon the premises of respondents between 11:30 p. m. and 7:30 a. m. was predominantly for the benefit of respondents, as the only practical means for getting instant service in case of fire (R. 381). In reversing that ruling, the court below rendered a decision in conflict with the *Wantock* and *Skidmore* cases.

The court below stated (R. 418) that the *Wantock* and *Skidmore* cases were not "controlling" because they did not

involve "sleeping time."[1] The applicable criteria and legal guides are plainly the same, however, whether the hours are devoted to sleep or amusement. If the hours are spent on the employer's premises and subject to his control "predominantly for the employer's benefit", they are part of the workweek. The application of this principle may yield a different result with a different state of facts, but this Court neither indicated nor intended that a different legal principle would apply. In applying the principles of the *Wantock* and *Skidmore* cases, the District Court made "appropriate findings of fact" and held that the night hours were spent on respondents' premises predominantly for the benefit of respondents. In reversing that judgment the court below exceeded its province as an appellant tribunal,[2] and rendered a decision in conflict with the applicable decisions of this Court.

The conclusion of the District Court was in accordance not only with law and logic but also with common understanding. The real service demanded of a fireman is that he be available, and that he be ready in any emergency to apply his special training and to expose himself to great danger. Throughout the twenty-four hours his time, apart from a few routine duties, is spent primarily in waiting for the

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[1] The record presented to this Court in the *Wantock* and *Skidmore* cases did not involve night hours designated as sleeping periods. However, in the *Wantock* case below, the Circuit Court of Appeals for the Seventh Circuit had indicated doubt whether a distinction could be drawn between employees sleeping and employees playing games, both subject to call. *Wantock* v. *Armour & Co.*, 140 F. (2d) 356, 357.

[2] A similar subsidiary error appears in the *Rokey* case where the trial court directed a verdict instead of submitting the case to those charged with finding the facts. The Circuit Court of Appeals said that directing a verdict was tantamount to a finding of every material issue of fact and law in favor of defendant, citing *Phenix Ins. Co.* v. *Kerr*, 129 Fed. 723 (C. C. A. 8th). The *Kerr* case was based on the old rule that when both parties move for a directed verdict, trial by jury is waived. That rule was abolished by Rule 50(a) of the Federal Rules of Civil Procedure.

alarm. His service is his attendance at the station. Unlike men in almost all other types of employment the fireman's value when sleeping at the station house is comparable to his service at other times, especially where his station is on the premises of a munitions plant. National statistics on "hours of work per week" and "average hours per work-week" for firemen employed by municipalities include all twenty-four hours under the two-platoon system, and do not exclude hours spent in sleeping at the station house. See *Fire Department Statistics,* Municipal Year Book, 1946, p. 365 *et seq.* As respondents' fire chief said: "It is a general procedure at nearly every fire department to work 24 hours" (R. 152). Any question as to the appropriate wage rate applicable to these night hours arises only after they have been held part of the workweek.

The Administrator of the Wage and Hour Division took the position in the court below, and the Circuit Court of Appeals for the Eighth Circuit held in *Rokey* v. *Day and Zimmerman, Inc.,* 157 F. (2d) 734, that the availability of ample hours of uninterrupted sleep is controlling on whether the hours are part of the workweek. That doctrine does not support the ruling of the court below, since the findings of the District Court show that petitioners did not have ample hours of uninterrupted sleep. If the *Rokey* doctrine had been applied, the court below would not have ordered the dismissal of the complaint. This point is more fully developed in part 3 of this petition for certiorari.

Furthermore, the doctrine of the *Rokey* case is not a sound application of the principles of the *Wantock* and *Skidmore* cases. The Administrator is apparently in some doubt on the matter. His brief *amicus curiae* filed in this Court in the *Skidmore* and *Wantock* cases states that the Administrator has concluded that the more reasonable view is that the usually uninterrupted eating and sleeping

periods might be excluded, but admits (p. 13) that "the contention that all of such time should be held compensable is not without substance.

The availability of ample hours of uninterrupted sleep is a factor which shows some benefit to the employees but it surely is not conclusive. More significant are these factors which show the predominance of benefit to the employer: In view of the fire hazard at this plant engaged throughout the twenty-four hours in manufacturing bombs and other munitions, it was necessary to have a fire department "on duty" between 11:30 p. m. and 7:30 a. m. (R. 151). The benefit in increased protection to the employer extends beyond the mere pecuniary reduction of insurance premiums (see 323 U. S. at 131), or pecuniary equivalent to self-insurers in the reduction of the actuarial risk. Indeed, the employer docked employees at time and one-half for hours off the premises during the night period, in order to insure their presence (R. 379). The employees were not given residences at the plant.[3] They were deprived of the liberty and privacy of being with their families at their residences, and were required to sleep in uncomfortable and dangerous conditions at an ordance plant (R. 377-379). If an employer hires separate night forces to obtain the benefits of fire protection, he cannot remove their hours from the coverage of the Act simply by providing adequate sleeping accommodations. In their night hours, petitioners are in the same position as

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[3] The only illustrations in Interpretative Bulletin No. 13 of the Wage and Hour Division (Wage and Hour Manual 1942 ed. p. 123) of hours excluded from the workweek are cases where the employee works in his own home (paragraph 6), or where the employee "makes his home at his employer's place of business" (paragraph 7). Paragraph 8 relates to employees "subject to call after the completion of their regular working day"; their time is hours worked "if the employee is required to remain on call in or about the place of business of the company", but not if he merely leaves word where he can be reached.

such night forces. They were required by the employer to spend these hours at a prescribed place on the employer's premises, subject to the employer's control, and for the employer's benefit. The hours are part of their workweek.

2. In this aspect of the case, the rulings both of the court below, and of the Circuit Court of Appeals for the Eighth Circuit in the *Rokey* case, holding "sleeping periods" as not working time under the Act, not only misapply the decisions of this Court but also conflict in principle with *Seneca Coal & Coke Co.* v. *Lofton*, 136 F.(2d) 359 (C. C. A. 10th), certiorari denied, 320 U. S. 772. That case held that the half-hour "lunch time" of a night watchman at a coal mine could not be excluded in determining hours worked as the employer contended. The Administrator of the Wage and Hour Division classifies eating and sleeping together as private pursuits, and regards adequate time therefor as excluded from the workweek.

The facts, as set forth by the District Court in *Lofton* v. *Seneca Coal & Coke Co.*, 2 Wage Hour Cases 669 (N. D. Okla.), showed that there was an oral contract that the watchman would work from 4:30 p. m. to 6:30 a. m., defendant's rules allowing each employee to take one-half hour off for lunch. The District Court found (2 Wage Hour Cases at 675):

> • • • that plaintiff's employment was at night and isolated, and that plaintiff could not leave his place of employment during the lunch period, but was required by circumstances to remain at his place of work, so that defendant received the benefit of his presence as night watchman during the lunch period; and that for this reason defendant was not entitled to deduct the half hour lunch period in arriving at plaintiff's overtime compensation.

The same conclusion is reached as to sleeping time of a watchman in *Whitsitt* v. *Enid Ice and Fuel Co.*, 5 Wage Hour Rept. 636 (W. D. Okla.).

3. Even under the doctrine of *Rokey* v. *Day and Zimmerman, Inc.*, 157 F.(2d) 734, where the Circuit Court of Appeals for the Eighth Circuit applied the view of the Administrator of the Wage and Hour Division that whether hours of sleep on the employer's premises constitute working time depends on whether there are ample hours of uninterrupted sleep, the court below would not have dismissed the complaint but would have affirmed, or at least remanded the cause. Accordingly, the result below is in conflict with the *Rokey* case.

The District Court made findings that the intra-plant radio operated throughout the night, with frequent calls, at a volume twice as loud as the normal radio or speaking voice and at one station even louder, and he made a number of other findings on the unsanitary, noisy and uncomfortable conditions (R. 377-378). He found as true the various statements by petitioners as to the conditions which they said interrupted their sleep (*e. g.* R. 47 ff, 62 ff, 92, 106, 111, 119-120, 124 ff, 134). His findings did not accept the testimony, given by the two witnesses for respondent who said they were able to sleep, that the volume of the radio was only a little louder than an ordinary conversational tone (R. 198, 204).

The court below stated that the District Court had not found that the sleeping quarters were inadequate or of such a character that the men were unable to obtain normal rest, but it admittedly placed no significance on that point (R. 419). The District Judge thought that the adequacy of the sleeping accommodations was not controlling (R. 332). If he had regarded such an express finding as signifi-

cant, it is plain that he would have found the sleeping conditions inadequate.

The Administrator of the Wage and Hour Division also took the view in his brief, *amicus curiae,* filed with the Circuit Court of Appeals below, that the District Court's findings support a judgment for petitioners on the ground that the sleeping accommodations were inadequate to permit a normal night's sleep.[4] Application of the *Rokey* doctrine by the court below would have precluded dismissal of the complaint.

4. After stating that the *Wantock* case was not controlling, the court below, without considering the application of the principles of the *Wantock* and other decisions, disposed of this case on the same ground it used in *Bowers* v. *Remington Rand,* that the employees are bound by their contract of employment as an agreement to settle the question whether certain activity or non-activity constitutes work or employment, citing *Tennessee Coal Co.* v. *Muscoda Local,* 321 U. S. 590.

That ruling should be reviewed by this Court for two reasons. First the court below proceeded in disregard of and in conflict with the applicable decisions of this Court. And then it went on to make a ruling on a problem of importance which has been expressly reserved by this Court.

The court below. in citing the *Tennessee Coal Co.* case, presumably referred to the passage in that opinion where this Court stated that it was not there concerned with the

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[4] That brief stated (p. 17): "However the specific findings made by the District Court concerning the conditions existing in the sleeping quarters might justify the conclusion that in the ordinary course of events the firemen would not be able to obtain a normal night of rest in adequate and comfortable accommodations. Thus while the reasoning of the District Court is inconsistent with the principles set forth in this brief, the decision may be consistent with the Administrator's interpretation if the sleeping accommodations furnished were inadequate to permit a normal night's sleep."

effect that customs and contract might have in borderline cases where the other facts rise to serious doubts as to whether certain activity or non-activity constitutes work or employment (321 U. S. at 603).

Assuming that the employees' vote in favor of the two-platoon plan in this case represented an employment agreement, the court below erred in considering only the employment agreement and holding it conclusive. It was the duty of the court to proceed first to consider the facts of the activity and non-activity involved, in accordance with the principles governing the application of the Act, and then to consider whether the agreement could be regarded as consonant with those principles. *Tennessee Coal Co.* v. *Muscoda Local, supra; Jewell Ridge Corp.* v. *Local,* 325 U. S. 161; *Anderson* v. *Mt. Clemens Pottery Co.,* 327 U. S. —, 90 L. ed. 1114. The failure of the court below to proceed in that manner is in conflict with these decisions. An agreement to leave the employees uncompensated for time spent on the employer's premises at his insistence, under his control, and primarily for his benefit is of no effect. *Ibid.* The governing principles, set forth in the *Wantock* and *Skidmore* cases, show these night hours were part of the workweek.

Even where a court, after considering the applicable principles, regards the facts of a case as giving rise to serious doubts whether certain activity or non-activity constitutes work, it should not give conclusive effect to an employment agreement. The question of the proper effect of such an agreement was reserved in the *Tennessee Coal Co.* case and the other cases cited. Such an agreement would seem properly to be not a conclusive element but rather one of the facts before the court indicating whether the hours were spent on the employer's premises predominantly for the benefit of the employer or employee. Cf. *Skidmore* v. *Swift & Co.,* 323 U. S. 134 at 137. Even an

express recital that certain hours will not be compensated is not as clear as the plant's requirement that the employees remain on the premises and the employer's docking them at time and a half for absences during those hours in order in insure their presence (R. 379).

But in any event this Court's reservation in the *Tennessee Coal Co.* case and the *Jewell Ridge* case, related to "bona fide contracts or customs to settle difficult and doubtful questions as to whether certain activity or non-activity constitutes work" (325 U. S. at 169). This Court surely did not intend to include in that category of contracts an arrangement like that revealed in this case. Respondents circulated a voting ballot (R. 290), not an offer binding respondents upon acceptance. The plan was proposed on the flat basis that the night hours would not be compensated. There was no discussion with the firemen whether those were hours of duty or whether any account should be taken of their enforced presence. No increase in hourly rate was provided; and the employers saved substantial amounts by obtaining the uncompensated presence of firemen and thus reducing the number of firemen (R. 374-377).

More significantly, the facts show that the favorable vote was obtained by the employer's use of coercive pressure. The court below referred only to the employees' vote in favor of the two-platoon system in December 1943 (R. 417). It ignored completely the surrounding facts set forth in the District Court's findings (at R. 375) and opinion (at R. 324-325, 66 F. Supp. at 51). The employees rejected the plan on two previous occasions, objecting both to the lack of pay while they were at the fire station, and to separation from their families (R. 289, 374). The District Court found that the firemen finally voted in favor of the plan only after "the firemen, before voting, were given to understand that if they wanted to retain their jobs as

firemen they would be required to vote for the plan, and, if they did not vote for the plan, they would be transferred to another department in the plant or discharged" (R. 375).

The Court should grant certiorari to correct the failure to apply its decisions, and to provide enlightenment on the scope of a matter previously left open—the effect to be given to certain contracts or customs, and the nature of contracts or customs which may be given that effect. The matter has relevance to agreements and arrangements now being evolved or continued throughout the Nation.

5. Informal estimates of the Department of Justice are that approximately 25 pending suits, distributed over five circuits, concern the application of the Fair Labor Standards Act to these double platoon plans. It would aid the administration of this considerable body of Federal litigation if this Court were to grant the petitions for certiorari in this case, and in the *Rokey* and *Bowers* cases, review the divergent approaches of the opinions in the Circuit Courts of Appeals, and clarify the relevant principles of law.

Conclusion

For the reasons stated, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Counsel for Petitioners.

February, 1947.

APPENDIX

Statutory Provisions Involved

The pertinent provisions of the Fair Labor Standards Act of 1938 (c. 676, 52 Stat. 1060, 29 U. S. C., sec. 201) read as follows:

Section 3. As used in this Act—

* * * * * * *

(d) "Employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee but shall not include the United States or any State or political subdivision of a State, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

(e) "Employee" includes any individual employed by an employer.

* * * * * * *

(g) "Employ" includes to suffer or permit to work.

* * * * * * *

Sec. 7(a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—

(1) for a workweek longer than forty-four hours during the first year from the effective date of this section.

(2) for a workweek longer than forty-two hours during the second year from such date, or

(3) for a workweek longer than forty hours after the expiration of the second year from such date,

unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one-half times the regular rate at which he is employed.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 993

VIRGIL D. BELL, ET AL.,

Petitioners,

vs.

SETON PORTER, ET AL.

REPLY BRIEF ON BEHALF OF PETITIONERS

Respondents' Brief in Opposition makes statements which are inaccurate or require further comment.

1. In *Skidmore* v. *Swift & Co.*, 323 U. S. 134, this Court did not hold that sleeping and eating time should be excluded from a judgment for plaintiffs. Plaintiffs sued for all hours spent on the premises. This Court reversed the judgment for defendants and remanded the cause, stating the principle of "predominance of benefit". It in no way held or directed that there should be excluded from the judgment for plaintiffs hours when plaintiffs were permitted to sleep and eat but which they were required to spend on the premises, nor did it consider the fact conditions concerning such hours. In pursuance of the principle of the *Skidmore* and *Wantock* cases the District Court stated in its opinion (R. 331): "The court is of opinion that plaintiffs were employees of defendants in a stand-by capacity during the time they were in their bunks, as well

as during the remaining 16 hours when they were not engaged in active assigned tasks."

2. In *Seneca Coal & Coke Co.* v. *Lofton*, 136 F. (2d) 359, there is no doubt that the eating time issue was passed upon by the Circuit Court of Appeals for the Tenth Circuit. It was raised by Assignment of Error.* The Court expressly stated (p. 362) first, that the District Court "found that the employer had erroneously deducted one-half hour lunch periods from the work day" and accordingly added overtime for this period, and second, that it affirmed the liability for damages "as computed and awarded by the trial court."

3. The District Court found (R. 375): "The Court further finds that the firemen, before voting, were given to understand that if they wanted to retain their jobs as firemen they would be required to vote for the plan, and, if they did not vote for the plan, they would be transferred to another department in the plant or discharged. * * * The Court further finds that a number of the plaintiffs did not understand what their wages would be under the two-platoon system." This was the finding on how it was that the firemen finally voted for the plan they had twice before rejected.

Respondents suggestion that this finding has no support in the record (p. 10) is erroneous. The record contains testimony that the men were given to understand that the alternative to a favorable vote was a release (R. 58), or transfer to other jobs of unspecified pay and character (R. 33, 37), and that indeed there was no alternative since the two-platoon plan would be installed in any event (R. 90). Men were thus pressured into voting for the plan even

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* Assignment of errors, No. 5 and No. 7, presented to the Circuit Court of Appeals, and contained in the record of the case before this Court, No. 222, October Term, 1943.

though they did not then understand what their pay would be under the two-platoon plan (R. 33, 58, 67). The form of the ballot (R. 290), and the testimony of defendant's witness Mortenson (R. 153), were emphasized by the trial court not as the sole evidence but as generally corrobatory admissions supporting the finding.

4. At the last respondents are unwilling to stand on the stark ruling below that men are bound by agreements not to receive pay whether or not they are given normal sleeping accommodations. Respondents contend (p. 14) that the sleep was adequate, quoting language in the *Rokey* opinion that those plaintiffs had normal sleeping accommodations. But the record in this case shows that the men in these plant domitories were subject to unusual loud noises, including a loud plant radio which was not turned down even after their complaint, guards walking through the sleeping quarters to use the toilet, and a number of other disturbances to sleep pointed out by the firemen (see record references, petition, p. 13) and stated in the findings (R. 377-378).

5. The importance of the questions presented, as outlined in the petition (p. 17), is not challenged by respondents.

Respectfully submitted,

HAROLD LEVENTHAL,
Washington, D. C.;
JOHN P. HALEY,
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Supreme Court of the United States

OCTOBER TERM, 1946

NO. 993

VIRGIL D. BELL, et al.,
Petitioners,

v.

SETON PORTER, et al.,
Respondents.

BRIEF OF RESPONDENTS OPPOSING PETITION FOR WRIT OF CERTIORARI TO CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

STATEMENT OF CASE.

This case involves the question of the validity, under the Fair Labor Standards Act of 1938, of the so-called "two-platoon" system in force in the fire department at the Elwood Ordnance Plant, Elwood, Illinois, during the period from February 27, 1944 to December 1, 1945.

The Elwood Ordnance Plant was a government-owned bomb and artillery shell loading plant operated by the respondents for the Government during the war years under a cost-plus-a-fixed-fee contract with the War Department (R. 372, 373). In 1943 the Army proposed that the respondents adopt in the Elwood fire department the two-platoon system which had been adopted previously at a

number of similar ordnance plants with the approval of the Wage and Hour Administrator (R. 374). The two-platoon system was a manpower conservation measure designed to alleviate the acute manpower shortage with which respondents and other war contractors were confronted (R. 142, 152, 266, 267).

The two-platoon system was proposed to the petitioners in the late summer of 1943 but did not meet with their approval at that time and they stated a number of objections to it, among which were lack of sleeping, cooking and eating facilities in the fire houses, indefinite arrangements as to wages and the like (R. 374, 289, 290). Prior to that time the fire department had been operated on a three-shift per day system under which the firemen on duty on each shift performed normal duties and were not permitted to sleep (R. 374). Hence, there had been no occasion to install sleeping dormitories, cooking and eating facilities and other accommodations needed under the two-platoon system. To meet the above mentioned objections the respondents caused a survey to be made as to the facilities necessary to be installed for the operation of the system (R. 141). This survey culminated in a detailed written plan outlining the facilities required and rates of pay and wages under the system (R. 314, 315). In December 1943 the matter was again proposed to the firemen at which time they voted unanimously, by written ballot, in favor of the adoption of the system (R. 374, 375). As indicated at page 16 of the petition the plan was proposed to the firemen on the basis that "the night hours would not be compensated." Fire Chief Mortenson testified that the written plan was read and explained to the firemen at the time of the vote (R. 153). The District Court in its findings of fact stated "the defendants testified that the Chief of the Fire Department fully explained the operation of the two-platoon system, the hours of work, rates of pay and facilities to be

furnished by them in the event of the adoption of the system, and that the firemen voted freely and without coercion in favor of the adoption of the plan" (R. 375). The purpose of the vote was to obtain the firemen's agreement to work under the system. Had a substantial number refused to agree upon this working arrangement the same would not have been adopted for fear of losing manpower and thus defeating the primary objective of the system (R. 142).

Prior to the inauguration of the two-platoon system the respondents sought and obtained through Army channels a written opinion dated February 4, 1944 from William R. McComb, Deputy Administrator, Wage and Hour and Public Contracts Division, U. S. Department of Labor, to the effect that the working arrangement as agreed upon between the firemen and the respondents "appears to be unobjectionable and will be considered by the Administrator as constituting a proper method of computing hours under the Act." This opinion was offered in evidence at the trial but was refused upon objection by petitioners' counsel as being irrelevant and immaterial to the issues (R. 142-149, 313). Upon the faith of this opinion and in accordance with the agreed plan, the respondents installed the necessary sleeping, eating and sanitary facilities and inaugurated the two-platoon system on February 27, 1944. The system was continued in effect until the respondents turned the plant back to the Army after the cessation of hostilities on December 1, 1945 (R. 375).

Under the two-platoon system each platoon of firemen remained on the premises on alternate days for 24 consecutive hours commencing at 7:30 A.M. The 16-hour period from 7:30 A.M. to 11:30 P.M. was considered working time. During this period about five hours were occupied with such duties as cleaning equipment, policing living quarters, testing hose, drilling and similar duties normally

assigned to firemen. The remaining portion of this period was spent in reading, listening to commercial radio programs, playing cards, horseshoes and baseball, cooking and eating meals and other personal activities. The firemen were free to retire in the sleeping dormitories at any time after 9 or 10 P.M., except that one man was required to remain awake in each station until 11:30 P.M. (R. 164, 296, 298).

The District Court found that after 11:30 P.M. all firemen were free to retire and no active duties were assigned to them, except when they were called out for night alarm duty (R. 378). Interruptions of the sleeping period by fire alarms were very infrequent. The total time spent on such duties by all firemen was only 136 hours out of a total of 108,720 sleeping period hours. Four firemen were never called out for such duty and the remainder spent from 30 minutes to 8 hours on such duty (R. 379).

The District Court also found that between 11:30 P.M. and 7:30 A.M. " a few of the plaintiffs were assigned actual duties to perform with respect to picking up laundry and driving dispatchers" (R. 378). The record discloses that such activities were insignificant in that they involved only 3 of the 53 firemen and a total elapsed time of less than three hours (R. 319).

In accordance with the agreed plan the petitioners were fully compensated for the hours between 7:30 A.M. and 11:30 P.M. but were not paid for the sleeping period hours between 11:30 P.M. and 7:30 A.M. except for the 136 hours aggregate time when they were called out to answer night alarms for which they were fully compensated. All hours worked in excess of forty per week were compensated for at one and one-half times the basic hourly rate of pay (R. 376).

Any saving in manpower or money attributable to the adoption of the two-platoon system accrued to the Government and not to the respondents for the reason that all labor costs at the plant were borne by the Government and respondents' compensation as contractor was a fixed fee not dependent upon savings effected in labor costs (R. 299-309).

The District Court concluded as a matter of law that the sleeping hours between 11:30 P. M. and 7:30 A. M. constituted compensable working time under the Act and entered a judgment in favor of petitioners aggregating $304,219.76, including liquidated damages and fees for petitioners' attorneys, and for costs of suit (R. 382).

The Circuit Court of Appeals reversed with instructions to dismiss the complaint (R. 420).

ARGUMENT.

In *Armour & Co.* v. *Wantock,* 323 U. S. 126, this Court considered and affirmed decisions of the District Court and Circuit Court of Appeals for the Seventh Circuit holding that, under the working arrangement and circumstances there presented, firemen's waiting time, *exclusive of sleeping and eating time,* constituted working time under the Act.

In *Skidmore* v. *Swift & Co.,* 323 U. S. 134, this Court reversed and remanded a decision holding that time spent by firemen on the employer's premises subject to call, including sleeping and eating time, was not working time under the Act for the reason that the decision below was based upon the erroneous proposition that such time, as a matter of law, may not be considered working time. Upon remand the lower court allowed recovery for the time spent in the fire station "less 8½ hours each night for sleeping, dressing and other private pursuits." See *Bridgeman* v.

Ford, Bacon and Davis (D. C. Ark. 1946) 64 F. Supp. 1006, 1014. The result of the *Armour* and *Skidmore* cases was, therefore, to deny recovery for time spent by the firemen in sleeping and eating in the fire stations subject to call in case of emergency and to permit recovery for all other "on call" time.

This case involves solely the question whether the eight-hour period when the firemen were asleep in the fire stations constitutes compensable working time. Under the agreed working arrangement all other time spent by the firemen on the premises was regarded as working time and they were fully compensated for it. Therefore, the result of the decision below is fully in accord with the results in *Armour* and *Skidmore*.

Without exception the identical two-platoon system adopted at many other ordnance plants, in each case with the prior approval of the Wage and Hour Administrator, has been upheld as meeting the requirements of the Act. *Bridgeman* v. *Ford, Bacon and Davis,* (D. C. E. D. Ark. 1946) 64 F. Supp. 1006; *Eustice* v. *Federal Cartridge Corporation* (D. C. Minn. 1946) 66 F. Supp. 55; *Bowers* v. *Remington Rand, Inc.* (CCA 7) 6 Wage-Hour Cases 496, No. 995 in this Court; *Rokey* v. *Day & Zimmermann, Inc.* (CCA 8), 157 F. 2d 734, No. 994 in this Court, and the case at bar.

In similar cases sleeping time of watchmen and porters subject to call in case of emergency also has been held not to constitute working time within the meaning of the Act. *Johnson* v. *Dierks Lumber and Coal Co.* (CCA 8) 130 F. 2d 115, 120; *Muldowney* v. *Seaberg Elevator Co.,* (D. C. N. Y. 1941) 39 F. Supp. 275; *Harris* v. *Crossett Lumber Co.,* (D. C. W. D. Ark. 1943) 62 F. Supp. 856.

It does not appear that the Circuit Court of Appeals for the Tenth Circuit had before it or considered the District Court's holding with respect to lunch periods in *Seneca Coal*

and Coke Co. v. *Lofton,* 136 F. 2d 359, cited by petitioners at page 12 of their petition. That case involved a question as to the applicability of the *Missel* formula (316 U. S. 572). It does not constitute a conflicting holding as to sleeping time under a two-platoon system.

The District Court's decision in *Whitsitt* v. *Enid Ice and Fuel Co.,* (D. C. W. D. Okla.) 5 Wage and Hour Reporter 636, cited by petitioners at page 13 of their petition, does not disclose fully the facts and circumstances surrounding the plaintiffs' employment and contains no discussion of the applicable authorities.

This Court has recognized that "borderline" cases involving doubt as to whether certain activity or nonactivity constitutes work or employment may be resolved by custom or contract between the parties. *Tennessee Coal Co.* v. *Muscoda Local,* 321 U. S. 590, 603; *Jewell Ridge Corp.* v. *Local,* 325 U. S. 161, 169-170; *Armour & Co.* v. *Wantock,* 323 U. S. 126; *Skidmore* v. *Swift & Co.,* 323 U. S. 134. Unlike the situations presented in the iron and coal mining cases, the hours spent in sleep in this case cannot be said to "partake of the very essence of work" (325 U. S. 161, 170). Rather, in common understanding time spent in sleep is the very antithesis of work. Even if it be assumed that time spent in sleeping on the employer's premises subject to call in case of emergency is not under the circumstances presented here excluded from the "workweek" as a matter of law, at the very least, an extremely "doubtful" or "borderline" question is presented as to whether such non-activity constitutes work. The unanimity of opinion among the courts which have considered the problem of sleeping time under the two-platoon system and the position of the Administrator serve to emphasize the grave doubt that such time may properly be regarded as working time. Hence, the agreement between the parties as to the sleeping period hours should prevail.

In the *Skidmore* case this Court said concerning such doubtful situations (323 U. S. 134, 137):

> "The law does not impose an arrangement upon the parties. It imposes upon the court the problem of finding what the arrangement was. We do not minimize the difficulty of such an inquiry where the arrangements of the parties have not contemplated the problem posed by the statute."

Here, however, the lower courts were presented with no such difficulty. The "problem posed by the statute" was considered prior to the inauguration of the two-platoon system and the same was adopted only after an opinion had been obtained from the Administrator approving the working arrangement agreed upon by the parties concerned as being a reasonable and proper method of computing working time under the Act (R. 313).

The two-platoon system was proposed to and discussed with the firemen on several occasions; they were informed that under the plan the sleeping period was not to be regarded as working time; they voted unanimously in favor of the adoption of the system; the respondents installed the required sleeping, cooking and other facilities called for by the approved plan; the Administrator's approval of the agreed arrangement was secured; the system was inaugurated and the firemen worked thereunder and received compensation computed in accordance therewith for a period of twenty-one months. These facts clearly establish an agreed working arrangement or contract between the parties which, in the light of the Administrator's specific approval, was in good faith assumed to settle any doubt as to whether time spent asleep in the fire station dormitories constituted working time.

The conclusion of law by the District Court that "the time spent by plaintiffs upon the premises of the defendants during the period between 11:30 P.M. and 7:30 A.M.

was predominantly for the benefit of the defendants" (R. 381) was obviously an erroneous conclusion based upon the mistaken conception that the mere presence of the firemen on the employer's premises is decisive of the case. This conclusion disregards the "doubtful" or "borderline" nature of the nonactivity of the firemen during the sleeping period and fails to take into account the agreement of the parties with respect thereto. The time was spent in sleeping and was free from assigned duties except in the event of infrequent alarms for which full compensation was paid. Sleep is necessarily for the benefit of the sleeper and is a "pursuit of a purely personal nature which would presumably occupy the employees' time whether on duty or not." *Skidmore* v. *Swift & Co.*, 323 U. S. 134, 139. It is true the respondents realized some benefit from the availability of the firemen at the fire house during the sleeping period, and it was apparently the theory of the trial court that such availability alone was decisive. However, the availability of employees whether on or off the premises is always beneficial to any employer. Where, as here, employees are permitted to sleep and throughout the period in question did sleep with interruptions so infrequent (for which compensation was paid) as to be inconsequential, such a "borderline" or "doubtful" case is presented that the agreement of the parties should determine the outcome.

In this case the parties by their agreement upon the two-platoon system as a working arrangement mutually determined that the hours spent in sleep were not to be considered working time. As stated by the Circuit Court of Appeals (R. 419):

> "Appellees, in consideration of their employment as firemen, were willing to sleep on the premises and keep themselves available for duty if called upon during their rest period; their contract was to wait to be engaged . . ."

The court below in reversing the District Court properly gave effect to the agreed working arrangement or employment contract as controlling the "doubtful" or "borderline" situation presented.

Petitioners urge at pages 16 and 17 of the petition that the employment contract should not be regarded as controlling because of the "employer's use of coercive pressure" in connection with the firemen's vote on the adoption of the system. This characterization is utterly unfounded and similar argument was properly disregarded by the Circuit Court of Appeals. The District Court made no finding that the vote was subject to employer coercion or pressure. Petitioners' assertion is based upon the finding of the trial court that in connection with the voting on the two-platoon system the firemen were given to understand that anyone not voting for the plan would be transferred to another department in the plant or discharged. The trial court supported this finding by specific reference to the testimony of Fire Chief Mortenson, a witness for the defendants, and to the form of the ballot (R. 375).

But the testimony of Chief Mortenson utterly fails to support this conclusion. He testified he told the firemen that any not required after the adoption of the two-platoon system would be referred to the Personnel Department and given other jobs in the plant at equal or better pay (R. 153, 154). He specifically denied informing the firemen that any not voting in favor of the plan would be discharged (R. 154). Certainly there is nothing in the form of the ballot (R. 290) to support the conclusion that a discharge would follow a vote against the plan. Even if, contrary to the fact, it be assumed the firemen were advised that anyone voting against the plan would be transferred or discharged such cannot be considered to be "coercive pressure." The then existing manpower shortage disproves the character-

ization (R. 142, 152, 266, 267). This Court will take judicial notice of the fact that during the war years high-paying jobs were plentiful and employers were using every device conceivable to satisfy and retain their employees and to encourage new personnel to add themselves to the payroll. It was an employees' market during which economic pressure from fear of losing a job was non-existent.

Throughout their petition the petitioners have attempted to create the impression that the sleeping facilities were inadequate to afford normal rest. The record belies such argument. As was said by the Circuit Court of Appeals in its opinion, the District Court "did not find that the sleeping quarters were inadequate or of such a character that the men were unable to obtain normal rest" (R. 419). The facts demonstrate the facilities furnished were amply adequate to afford normal rest (R. 249-263). The firemen were permitted to retire at 9 or 10 P. M. (R. 164, 296, 298) although paid until 11:30 P. M. They slept in the dormitories for twenty-one months without once availing themselves of the privilege of complaining as to the working and sleeping conditions through the grievance procedure established by the employer for that purpose (R. 49, 62, 63, 83, 101, 121, 122, 293-295). Petitioners' assertion that if the trial court had regarded this issue as significant "it is plain he would have found the sleeping conditions inadequate" (Petition 13, 14) is purely speculative and in fact the trial court could have made no such finding on the record in this case. The following language of the court in *Rokey* v. *Day & Zimmermann,* is appropriate to the record here (157 F. 2d 734, 738):

> "There was no substantial evidence that eight hours of sleep every night were not afforded these employees to the same extent that sleep would have been available to those living in certain Metropolitan districts or near

industrial areas, or in their own homes, or at hotels or rooming houses. The Act does not contemplate that the court shall weigh individual susceptibilities to noises which result from night traffic."

CONCLUSION.

The decision of the Circuit Court of Appeals accords with the decisions of other courts which have considered the problem and correctly applies the principles enunciated in applicable decisions of this Court. Therefore no question requiring review by this Court is presented and the petition for a writ of certiorari should be denied.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1946

No 993

VIRGIL D. BELL ET AL., PETITIONERS

v.

SETON PORTER ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE[1]

The petition herein presents substantially the same narrow factual issue that is raised in the companion cases, *Rokey* v. *Day & Zimmermann, Inc.*, No. 994, and *Bowers* v. *Remington Rand, Inc.*, No. 995, and the attention of this Court is respectfully invited to the Government's briefs in opposition filed therein. In this case an issue is

[1] Respondent is a "cost-plus contractor" who has entered into a contract with the War Department, pursuant to which the contracting agency, or the United States, is, or may be, obligated to reimburse the contractor for money paid in resisting or settling claims arising out of work performed under the contract. In this case respondent is represented by private counsel.

raised as to whether the sleeping facilities were adequate. That question is purely a factual one which would not in itself warrant certiorari. Accordingly, we submit that this petition for certiorari should be denied.

Respectfully submitted.

GEORGE T. WASHINGTON,
Acting Solicitor General.

MARCH 1947.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 993

VIRGIL D. BELL, ET AL.,

Petitioners,

vs.

SETON PORTER, ET AL.

No. 994

WILLIAM R. ROKEY AND HAROLD McGOWND, ET AL.,

Petitioners,

vs.

DAY AND ZIMMERMAN

No. 995

CLAUDE BOWERS, ET AL.,

Petitioners,

vs.

REMINGTON RAND, INC.

PETITIONS FOR REHEARING AND FURTHER RELIEF

HAROLD LEVENTHAL,
JOHN P. HALEY,
EDWIN A. HALLIGAN,
SAMUEL M. LANOFF,
J. L. THOMAS,
JOHN HALE,
J. C. PRYOR,
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 993

VIRGIL D. BELL, ET AL.,

vs. *Petitioners,*

SETON PORTER, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 994

WILLIAM R. ROKEY AND HAROLD McGOWND, ET AL.,

vs. *Petitioners,*

DAY AND ZIMMERMAN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 995

CLAUDE BOWERS, ET AL.,

vs. *Petitioners,*

REMINGTON RAND, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITIONS FOR REHEARING AND FURTHER RELIEF

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1. These are combined petitions which pray:

(a) That the petition for certiorari No. 993 in *Bell* v. *Porter,* be granted, and the cause heard on the merits;

(b) That the petitions for certiorari in No. 994, *Rokey* v. *Day and Zimmerman*, and No. 995, *Bowers* v. *Remington Rand*, be maintained on the Court's docket, and within the Court's jurisdiction, pending disposition of No. 993 on the merits.[1] In the event of reversal in No. 993, those cases should be remanded for further proceedings as may be appropriate.

2. On March 31, 1947, the Court granted certiorari in the *Bell* case, No. 993, and denied certiorari in the *Rokey* and *Bowers* cases. On April 7, 1947, the Court vacated its previous order in the *Bell* case and denied certiorari.

3. Petitioners are unaware of the basis for the Court's rulings. Petitioners conceive that that basis may be as follows:

(a) The *Bell* petition presents substantial issues warranting consideration of the merits.

(b) The *Rokey* and *Bowers* petitions present issues which are deemed less substantial, and in the aggregate do not warrant the consideration of three cases by this Court.

(c) Yet the consideration of the *Bell* petition may lead to reversal on grounds which would—or might—warrant reversal in the *Rokey* and *Bowers* cases. Accordingly, granting certiorari in the *Bell* case alone may produce an element of unfairness occasioned by the need for dispatch in the handling of the Court's business. Denial of all three petitions avoids that undesirable result.

If this assumption is sound, it is submitted that the Court can accommodate the various public interests by hearing

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[1] A similar course was suggested in the Memorandum of National Labor Relations Board filed in *Neptune Meter Co.* v. *National Labor Relations Board*, No. 905, October Term, 1946.

argument in *Bell* v. *Porter*, and withholding final action in the *Rokey* and *Bowers* cases. In the event of reversal in the *Bell* case, this Court could remand the *Rokey* and *Bowers* cases for such action as may be appropriate.

4. Although the three petitions are interrelated to some extent, the *Bell* case presents certain far-reaching and substantial issues, which to some extent are not present in the *Rokey* and *Bowers* cases and to a much greater extent are present in those cases but are shaped by a less clear-cut record, due to the difference in the findings of the trial court.

(a) Perhaps the question of most importance is one whose significance concerns the realistic application of the Act in current practice, apart from any immediate litigation. That issue is the extent to which an employer can maneuver around the Fair Labor Standards Act by obtaining employees' acquiescence in the employer's program, even using coercive pressure where necessary. The trial court's findings in the *Bell* case point up that issue. (Petition No. 993, page 16). The employer obtained the acquiescence of the individual employees—who were not represented by a union or other agent, and were not in the position of "negotiating" an agreement—by threatening to fire them, or at best offer them the choice of transfer to a labor pool or other undisclosed jobs. The appellate court ignored the findings of the trial court in the *Bell* case.[2]

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[2] In the *Bowers* case the District Court excluded testimony of employer pressure (R. 69), and completely ignored and failed to consider in any way, by either accepting or rejecting, McCormick's testimony as to employer pressure (R. 50). The Government erred in stating that McCormick was in favor of the two-platoon plan (Brief in Opposition No. 995, page 14, citing R. 49). The record reference shows that McCormick

(b) The *Bell* petition also presents the issue, going far beyond the situation of fire guards or any particular class of employees, that in Fair Labor Standards Act cases the determination of "predominant benefit" is a matter of ultimate fact to be resolved by the trial court. That is the teaching of *Skidmore* v. *Swift*, 323 U. S. 134, 136. This is a problem of continuing importance. See *e. g. Campbell* v. *Jones & Laughlin Steel Corp.* (W. D. Pa.), decided April 4, 1947 (Labor Cases, CCH, No. 63695; 15 LW 2575). The court awarded recovery for a 24-hour day to guards required to stay on the premises as additional protection to the mill during a strike. Though plaintiffs were employed in shifts on a basis of eight hours work and eight hours off, and were furnished sleeping accommodations, the court found that the entire 24 hours were spent in the mill predominantly for the employer's benefit. The *Bell* petition raises the substantial question of the proper province of an apellate tribunal, and whether the court below exceeded that province.[3]

(c) In support of the trial court's resolution of this ultimate fact in favor of plaintiffs in the *Bell* case are its findings as to the persistent interruptions to sleep, continued after plaintiffs' complaints. (See record references in Petition No. 993, page 13, Reply Brief, No. 993, page 3.)[4] On that basis the Administrator of the Wages and Hour Division has taken the position in court that the trial court's findings support the judgment for plaintiffs. (Petition No. 993, page 14.)

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stated he was in favor of that plan on the assumption of pay for all 24 hours.

In the *Rokey* case there was evidence of coercive pressure (No. 994, Testimony of McMurren, R. 49-50; Testimony of Westman R. 54-55).

[3] In the *Rokey* case the trial court directed a verdict.

[4] In the *Rokey* case the trial judge refused to permit such evidence to be introduced (No. 994, R. 20, R. 39).

(d) All three petitions urge the position that as a matter of law time required to be spent by fire guards on the employer's premises, under penalty of being docked, is part of the workweek under the Fair Labor Standards Act, even though the employees are permitted to sleep, because the time is so spent predominantly for the employer's benefit. That question is one of the ambit of the ruling in *Armour & Co.* v. *Wantock*, 323 U. S. 126 of the meaning of the Fair Labor Standards Act.

5. Denial of a petition of certiorari normally imports no decision on the merits. But the nature of this Court's two actions in *Bell* v. *Porter* may be taken to sanction the ruling of the Court below on the general issues discussed above.

6. To some extent the *Rokey* and *Bowers* cases involve all of the foregoing points. But the record in the *Bell* case presents all the substantial issues, and on a record which sharpens them suitably for decision by this Court. By considering the *Bell* case alone, and postponing final action in the *Rokey* and *Bowers* cases, this Court

(a) will consider all of the issues, including those of most substantial and general significance;

(b) will consider those issues on a clear-cut record;

(c) will avoid encumbering its argument docket;

(d) will avoid any discrimination, in the event it should finally decide *Bell* v. *Porter* upon a ground available to petitioners in the *Rokey* and *Bowers* cases.

Conclusion

7. It is prayed that this Court—

(a) grant these petitions for rehearing in No. 993, No. 994, and No. 995;

(b) grant the petition for certiorari in No. 993;

(c) recall the orders denying the petitions for certiorari in No. 994 and No. 995, and maintain these cases on its docket pending disposition of No. 993 on the merits;

(d) render any part of such relief as it deems appropriate.

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April, 1947.